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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. MANUEL JESUS PEREZ, Defendant and Appellant.	2d Crim. No. B288846 (Super. Ct. No. 16F-06618) (San Luis Obispo County)

Manuel Jesus Perez appeals his conviction by jury of first degree murder (Pen. Code, §§ 187, subd. (a), 189)[1] and arson of an inhabited dwelling (§ 451, subd. (b)). The evidence is uncontradicted. Appellant fatally stabbed his housemate, doused him with lighter fluid, and lit him on fire. In a bifurcated proceeding, the trial court found that appellant had a prior serious felony conviction (§ 667, subd. (a)) and four prior strike convictions (§§ 667, subds. (d)-(e), 1170.12, subds. (b)-(c)).

[1] All statutory references are to the Penal Code unless otherwise stated.

Appellant was sentenced to 85 years to life state prison. Appellant contends, among other things, that the trial court erred in not modifying a CALCRIM No. 625 instruction on voluntary intoxication to address first degree murder by lying in wait. We affirm the judgment of conviction but remand for the limited purpose of allowing the trial court to exercise its discretion on whether to strike the five-year serious felony conviction enhancement pursuant to Senate Bill No. 1393. (§§ 667, subd. (a), 1385.)

Facts and Procedural History

On July 11, 2016, appellant confronted his housemate, Joseph Kienly, in a darkened hallway at their Grover Beach house and stabbed him four or five times with a double-bladed knife. Before the attack, appellant zip-tied and duct taped two kitchen knives together and purchased lighter fluid. Appellant waited for Kienly to come out of the bathroom and stabbed him in the abdomen one or two times. Kienly pled for his life and stumbled into the kitchen where appellant stabbed him again, doused him with lighter fluid, and lit him on fire. Appellant left the house with a backpack and walked to San Luis Obispo where he was found hiding in a construction yard.

San Luis Obispo Police Officer Quenten Rouse spoke to appellant at the front of the construction yard. He asked appellant what was going on. Appellant appeared to be under the influence of a controlled substance. He volunteered that he had just killed his roommate, Kienly, because he was drilling holes in the house walls and appellant could not sleep. Appellant claimed that he could not take it anymore and "I killed him and set him on fire." Appellant also said he planned to kill Kienly days earlier when he taped the kitchen knives together.

In a recorded *Miranda* interview (*Miranda v. Arizona* (1966) 384 U.S. 436), after waiver of his rights, appellant told Grover Police Detective Brad Carey that he confronted Kienly in the hallway, stabbed him multiple times, and doused him with lighter fluid before lighting him on fire. Appellant drank alcohol and used methamphetamine to stay awake, and waited for Kienly "like a fucking cheetah trying to get a gazelle." When Kienly emerged from the bathroom, appellant said "'Surprise motherfucker, it ain't so funny now.'" Kienly made a half-hearted swing but appellant ducked and stabbed Kienly in the abdomen. As Kienly begged for his life, appellant stabbed him several times, doused him with lighter fluid, and used a "clicker" to set the body on fire.

Appellant's fingerprint was found on a bottle of lighter fluid, which was left at the murder scene along with a cigarette lighter and the double-bladed knife. Kienly's blood was on the knife and appellant's clothing and shoes.

On July 12, 2016, appellant was interviewed again at the San Luis Obispo County Jail. Appellant said that Kienly did not make any noise when he lit him on fire. Appellant watched Kienly burn until the smoke alarm went off.[2]

At trial, appellant conceded that he was guilty of arson. He argued that the jury should convict him of voluntary manslaughter. The trial court instructed on first and second

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[2] Before trial, appellant entered pleas of not guilty and not guilty by reason of insanity. Although appellant had a prior diagnosis of schizophrenia, two psychiatrists reported that he was competent to stand trial. During the trial, appellant withdrew the not guilty by reason of insanity plea.

degree murder, voluntary manslaughter, self-defense, imperfect self-defense, and voluntary intoxication.

On the murder count, the trial court instructed: "The defendant has been prosecuted for first degree murder under two theories: (1) the murder was willful, deliberate, and premeditated, and (2) the murder was committed while lying in wait or immediately thereafter. [¶] [¶] [¶] The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. . . ." (CALCRIM No. 521.)

With respect to murder by lying in wait, the jury was instructed: "The defendant is guilty of first degree murder if the People have proved that the defendant murdered while lying in wait or immediately thereafter. The defendant murdered by lying in wait if: [¶] 1. He concealed his purpose from the person killed; [¶] 2. He waited and watched for an opportunity to act; [¶] AND [¶] 3. Then, from a position of advantage, he intended to and did make a surprise attack on the person killed. [¶] The lying in wait does not need to continue for any particular period of time, but its duration must be substantial enough to show a state of mind equivalent to deliberation or premeditation." (CALCRIM No. 521.)

Voluntary Intoxication and Intent to Kill

Appellant contends that the trial court erred in not sua sponte modifying the voluntary intoxication instruction so that it applied to first degree murder by lying in wait. The trial court gave the standard CALCRIM No. 625 instruction without modification. In pertinent part it provides: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding

whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation, or the defendant was unconscious when he acted. [¶] [¶] You may not consider evidence of voluntary intoxication for any other purpose."

Appellant did not object or request that the instruction be modified, forfeiting the alleged instructional error. (See, e.g., *People v. Virgil* (2011) 51 Cal.4th 1210, 1260 [defendant forfeited instructional error by not objecting]; *People v. Richardson* (2008) 43 Cal.4th 959, 1022-1023 [failure to request modification of otherwise correct instruction forfeits claim on appeal].) If appellant wanted the trial court to instruct that voluntary intoxication could be considered with respect to lying in wait murder, "it was incumbent upon him to ask, and a claim of error in the failure to so instruct is forfeited for appellant purposes." (*People v. Townsel* (2016) 63 Cal.4th 25, 59 (*Townsel*).) There is no published case holding that a trial court has a sua sponte duty to so instruct. CALCRIM No. 625 is a pinpoint instruction that must be requested by defendant and "does not involve a 'general principle of law' as that term is used in the cases that have imposed a sua sponte duty of instruction on the trial court." (*People v. Saille* (1991) 54 Cal.3d 1103, 1120.) CALCRIM No. 625 correctly instructs that evidence of voluntary intoxication may be considered in determining whether appellant acted with intent to kill or with deliberation or premeditation. (*People v. Turk* (2008) 164 Cal.App.4th 1361, 1381; *People v. Timms* (2007) 151 Cal.App.4th 1292, 1298 [voluntary intoxication not admissible to negate implied malice].)

Relying on *Townsel*, *supra*, 63 Cal.4th 25, appellant argues that the trial court had a sua sponte duty to instruct on

how voluntary intoxication affected appellant's mental state to commit a lying-in–wait murder. In *Townsel*, our Supreme Court held it was error to instruct that intellectual disability evidence could be considered in determining whether the defendant formed the mental state for murder but could not be considered in determining whether the intellectual disability prevented defendant from forming the requisite intent to dissuade a witness or in rendering a true finding on a witness-killing special-circumstance allegation. (*Id*. at pp. 57-64.)

Here, there is no special circumstance allegation. "[P]remeditation and deliberation – the mental state required for first degree murder - differs from that required for the dissuading charge and witness-killing allegation . . . . [T]he jury's rejection of the intellectual disability evidence in finding premeditation and deliberation . . . does not necessarily compel the conclusion that it would have done likewise with respect to the [dissuading] charge and [witness-killing] allegation." (*Townsel*, *supra,* 63 Cal.4th at p. 64.) The court concluded that the instructional error prejudiced defendant's substantial rights and could be raised for the first time on appeal. (*Id*. at pp. 63-64.)

Unlike *Townsel*, CALCRIM No. 625 did not preclude the jury from considering appellant's intoxication with respect to lying-in-wait first degree murder. CALCRIM No. 625 directed the jury to consider voluntary intoxication in deciding whether appellant "acted with an intent to kill, or the defendant acted with deliberation and premeditation . . . ." CALCRIM No. 521 instructed that the duration for lying in wait "must be substantial enough to show a state of mind equivalent to deliberation or premeditation."

Appellant argues that the CALCRIM No. 625 Bench Notes recommend that that the instruction be modified to address "an[y] *additional specific intent requirement* other than intent to kill . . . . For example, if the defendant is charged with torture murder, include 'whether the defendant intended to inflict extreme and prolonged pain.'" (Judicial Council Cal. Criminal Jury Instructions (2018) CALCRIM No. 625, Bench Notes, p. 383, italics added.) First degree murder by lying in wait does not require a finding of specific intent to kill. (*People v. Superior Court* (*Bradway*) (2003) 105 Cal.App.4th 297, 309.) CALCRIM instructs that the duration of the lying in wait "must be substantial enough to show a state of mind equivalent to deliberation or premeditation." (CALCRIM No. 521.)

Appellant claims that murder by lying in wait requires proof of intent to make a surprise attack and CALCRIM No. 521 did not specifically instruct the jury that the "state of mind" for lying in wait is the functional equivalent of premeditation. He argues that the CALCRIM No. 521 instruction should have been modified to say that if the voluntary intoxication did not negate premeditation and deliberation, it did not negate the specific intent of lying in wait. But such an instruction would violate section 29.4, subdivision (b) which provides that evidence of voluntary intoxication is not admissible to negate the capacity to form any mental states for the crimes charged including intent, knowledge, premeditation, deliberation, or malice aforethought. "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed *a required specific intent*, or, when charged with murder, whether the defendant premeditated, deliberated, or

harbored express malice aforethought." (§ 29.4, subd. (b), italics added; see *People v. Berg* (2018) 23 Cal.App.5th 959, 966.)

Murder by lying in wait is not a specific intent crime. Appellant cannot "rewrite" section 29.4, subdivision (b) to require a jury to consider whether appellant's voluntary intoxication (i.e., alcohol and methamphetamine) affected his ability to form the intent to commit a lying-in-wait murder. The Legislature, in adopting the lying-in-wait provision for first degree statutory murder (§189), "only required that the defendant be shown to have exhibited a state of mind which is 'equivalent to,' and not identical to, premeditation or deliberation." (*People v. Ruiz* (1988) 44 Cal.3d 589, 615; see *People v. Hardy* (1992) 2 Cal.4th 86, 162 [lying in wait is not subset of premeditated and deliberate murder, but functional equivalent of proof of premeditation, deliberation, and intent to kill].) We accordingly reject the argument that the trial court had a sua sponte duty to modify CALCRIM No. 625 to instruct that voluntary intoxication may be considered in determining whether appellant formed the intent to commit a lying-in-wait murder. Section 29.4, subdivision (b) prohibits such an instruction.

First degree murder by lying in wait does not require a specific intent. "If the murder was perpetrated by means of lying in wait, it need not be independently determined to have been 'willful, deliberate and premeditated.' [Citations.] The crime of which [appellant] was convicted was not lying in wait, but murder. If it was perpetrated by means of lying in wait it is, by definition, first degree murder." (*People v. Dickerson* (1972) 23 Cal.App.3d 721, 727.)

CALCRIM No. 521 instructed that the state of mind required for lying in wait is the state of mind "equivalent to

deliberation or premeditation" and CALCRIM No. 625 instructed that evidence of intoxication could be considered in determining whether appellant acted with premeditation or deliberation. "There is no error in a trial court's failing or refusing to instruct on one matter, unless the remaining instructions, considered as a whole, fail to cover the material issues raised at trial." (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 277.)

Assuming, without deciding that the trial court erred in not modifying CALCRIM No. 625, any error would be harmless under any standard of review. (See *People v. Flood* (1998) 18 Cal.4th 470, 484 [error harmless where factual question posed by the omitted instruction was necessarily resolved adversely to the defendant under other, properly given instructions].) The uncontradicted evidence shows that appellant committed a lying-in-wait murder. Based on the instructions as a whole, there is no doubt the jury considered appellant's intoxication. Appellant fails to explain how the jury could have found that he was sober enough to premeditate and deliberate the murder, but was too intoxicated to harbor the "equivalent" mental state for lying in wait.[3] Because it could not have done so, any alleged instructional error was harmless. (*Ibid*.)

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[3] During deliberations, the jury submitted the following note: "We are finding a standstill in our deliberations on a unified definition of 'specific intent & mental state' ([CALCRIM No.] 252) as well as when we can and cannot consider intoxication ([CALCRIM No.] 625) – specific examples have been requested, to help translate the legal language into definitions we can mutually agree on." The trial court responded: "The court cannot provide examples or further instruction on those issues."

Five Year Serious Felony Enhancements

Appellant was sentenced to 85 years to life state prison based on the following sentencing calculation: On count 1 for first degree murder, the trial court imposed a 25-year-to-life term, tripled to 75 years to life based on appellant's prior strikes. On count 2 for arson of a residential structure, the trial court imposed a 25-year-to-life term which was stayed (§ 654), and then imposed a consecutive five-year serious felony enhancement (§ 667, subd. (a)) *on each count*, for a total aggregate term of 85 years to life state prison.

Appellant claims the trial court erred in not staying the five-year serious felony enhancement (§ 667, subd. (a); a status enhancement based on appellant's recidivism) on the arson count. If a trial court stays the determinate term on a substantive offense pursuant to section 654, any enhancement relating to that offense must also be stayed pursuant to section 1170.1. (*People v. Tua* (2018) 18 Cal.App.5th 1136, 1143.) But section 1170.1 "applies only to *determinate* sentences. It does not apply to multiple indeterminate sentences imposed under the Three Strikes law," as is the case here. (*People v. Williams* (2004) 34 Cal.4th 397, 402 (*Williams*); *People v. Felix* (2000) 22 Cal.4th 651, 656 [section 1170.1 only applies to determinate sentences]; *People v. Mason* (2002) 96 Cal.App.4th 1, 15 [same].) Appellant's 85-years-to-life sentence is an indeterminate sentence and is not governed by section 1170.1. (*Williams*, *supra*, at p. 402; *People v. Kam Hing Wong* (2018) 27 Cal.App.5th 972, 981.)

The prosecution and defense counsel were satisfied with the court's response.

"In multiple-count third strike sentencing cases, status enhancements such as section 667(a) for prior serious felonies and section 667.5(b) for prior prison terms, if applicable, should be used in *each count* in the calculation of 'the greatest minimum term'. . . ." (Couzens & Bigelow, Cal. Three Strikes Sentencing (The Rutter Group 2018) § 8:2, p. 8-28.) Because the Three Strikes law generally discloses an intent to use a defendant's recidivism to separately increase the sentence imposed for each new offense, the trial court did not err in imposing two prior serious felony enhancements (i.e., one five-year enhancement on each count) consecutive to the 75-year-to-life sentence. (*Williams*, *supra*, 34 Cal.4th at p. 405; *People v. Sasser* (2015) 61 Cal.4th 1, 12.) "[U]nder the Three Strikes law, section 667(a) enhancements are to be applied individually to each count of a third strike sentence." (*Williams*, *supra*, at p. 405.)

Trial Court Remand to Exercise Discretion on Whether to Strike Prior Serious Felony Conviction Enhancements

On September 30, 2018, the Governor signed Senate Bill No. 1393, which effective January 1, 2019, amends sections 667 and 1385 to give trial courts the discretion to dismiss, in furtherance of justice, five-year sentence enhancements under section 667, subdivision (a). (See Legis. Counsel's Dig., Sen. Bill No. 1393 (2017-2018 Reg. Sess.) Stats. 2018, ch. 1013, §§ 1, 2 ["This bill would delete the restriction prohibiting a judge from striking a prior serious felony conviction in connection with imposition of the 5-year enhancement"].) Appellant argues, and the People concede, that the new provisions apply to defendants whose appeals are not final on the law's effective date. (See *People v. Brown* (2012) 54 Cal.4th 314, 323 ["[w]hen the

Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date," fn. omitted].)

The Attorney General argues that a remand for resentencing would be a futile act because the trial court's statements at sentencing suggest that it would not have stricken the five-year enhancements. At time of sentencing, the trial court lacked the power to strike these enhancements. (See former §§ 667, subd. (a)(1), 1385, subd. (b); *People v. Garcia* (2008) 167 Cal.App.4th 1550, 1560-1561.) Remand is appropriate to give the trial court the opportunity to exercise its newfound discretion. (See, e.g., *People v. Rodriguez* (1998) 17 Cal.4th 253, 258 [limited remand to permit trial court to make threshold determination whether to exercise its discretion to strike prior conviction allegation]; *People v. Buckhalter* (2001) 26 Cal.4th 20, 35 [limited appellate sentence remand does not vacate original sentence].)

Disposition

We remand the matter for the limited purpose of allowing the trial court to determine whether one or both section 667, subdivision (a) enhancements should be stricken in the interest of justice. (§§ 667, subd. (a)(1),1385).) In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P. J. PERREN, J.

Craig B. Van Rooyen, Judge

Superior Court County of San Luis Obispo

Sylvia W. Beckham, under appointment by the Court of Appeal for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Shawn McGahey Webb, Supervising Deputy Attorney General, Shezad H. Thakor, Deputy Attorney General, for Plaintiff and Respondent.